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No. 80-1430

In the Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, PETITIONER

v.

LINCOLN ISAAC, ET AL.

E.P. PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION, PETITIONER

v.

KENNETH L. BELL

TED ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, PETITIONER

v.

HOWARD HUGHES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will discuss the following question, which is a restatement of the first question in the certiorari petition:

Whether on collateral attack the assumed futility of objection at the time of trial is sufficient "cause" to excuse a defendant's failure to make timely objection to erroneous jury instructions.

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INTEREST OF THE UNITED STATES

This case raises an important question concerning the availability of federal habeas corpus relief when a defendant has failed to comply with legitimate procedural rules requiring that claims be timely raised or forfeited. The Federal Rules of Criminal Procedure expressly provide that certain types of claims must be raised before or at trial. See Fed. R. Crim. P. 12, 30; see also Fed. R. Evid. 103(a)(1).[1] More generally, a criminal defendant's failure to make timely objection at trial is frequently held to bar the claim, although on direct appeal an appellate court may sometimes notice plain error affecting substantial rights (Fed. R. Crim. P. 52(b)). *E.g., United States* v. *Indiviglio*, 352 F.2d 276, 279-281 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966). The standard for determining when an error that was not duly objected to at trial or raised on direct

[1] Fed. R. Crim. P. 30 is virtually identical to Rule 30 of the Ohio Rules of Criminal Procedure, which is at issue in this case.

appeal can nevertheless support collateral relief is of substantial importance to the administration of justice in the federal system. The holding of the court of appeals in these cases—that the assumed futility of objection constitutes sufficient cause to excuse a failure to make timely objection—would, if sustained by this Court, substantially increase the susceptibility of otherwise final judgments in federal criminal cases to collateral attack.

STATEMENT

Isaac v. *Engle*

On May 30, 1975, an Ohio grand jury filed an indictment charging respondent Isaac with felonious assault (A. JA2). Following a jury trial, respondent Isaac was convicted of the lesser included offense of aggravated assault (A. JA6; Pet. App. A24). On September 15, 1975, Isaac was sentenced to six months to five years in prison (Pet. App. A2, A39).

None of the opinions filed in this case discusses the evidence presented at Isaac's trial.[2]

Relying on *State* v. *Robinson*, 47 Ohio St.2d 103, 351 N.E.2d 88 (1976), Isaac argued on direct appeal that, as a matter of state law, the trial court had erred in instructing the jury that the defendant had the burden of establishing self-defense by a preponderance of the evidence (A. JA11; Pet. App. A25, A40).[3] Since Isaac had failed to make timely objection to the trial court's instruction on self-defense, as required by Ohio R. Crim. P. 30, the state court of appeals refused to consider the claim on the merits, holding (A. JA11) that "[t]he failure to make such an objection waives any error * * *."[4]

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[2] No question as to the sufficiency of the evidence to support the jury's verdict was raised on direct appeal in the state courts (see A. JA7-JA11).

[3] The "erroneous" jury instruction is quoted in the Sixth Circuit panel decision in this case (Pet. App. A25 n.1).

[4] The court did note (A. JA11) that Isaac's counsel stated in both his opening and closing arguments that the burden of proof on the issue of self-defense was on the defendant. Other objections

The Ohio Supreme Court denied Isaac's motion for leave to appeal (A. JA12) and dismissed his "appeal as of right" "for the reason that no substantial constitutional question exists herein" (A. JA13).[5]

On March 31, 1978, Isaac filed a petition for federal habeas corpus (Pet. 4). Although the grounds for relief asserted (Pet. App. A39) are not entirely clear, Isaac's primary claim seems to have been that the refusal to reverse his conviction in light of *Robinson* was improper (*ibid.*). Isaac also stated (*ibid.*): "[T]he holding of the Court is contrary to the Supreme Court of the United States in regard to proving self-defense." The federal district court denied the petition without discussion of the merits, stating (*id.* at A41): "[Isaac] has not made a showing of either cause or actual prejudice. Accordingly, the Court HOLDS that he has waived his federal constitutional claim."

On appeal, a panel of the Sixth Circuit reversed (Pet. App. A24-A35). A majority of the panel held that the cause and prejudice standard established in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), was inapplicable to Isaac's claim as to the impropriety of denying him the benefit of the decision in *Robinson* (Pet. App. A31). On the merits of this claim, the panel majority held that the Ohio Supreme Court's decision to apply *Robinson* retroactively, but only in those cases in which the claim had been timely raised (*State* v. *Humphries*, 51 Ohio St.2d 95, 364 N.E. 2d 1354 (1977)), was arbitrary or capricious and therefore violative of due process (Pet App. A26-A30). Judge Celebrezze concurred (Pet. App. A33-A35).

On rehearing en banc, a four-judge plurality expressly rejected the approach of the panel majority (Pet. App.

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to the self-defense instruction, which presumably had been properly preserved at trial, were rejected on the merits (A. JA9-JA10).

[5] Under Ohio Rev. Code Ann. § 2505.29 (Page 1954), "[n]o appeal shall be filed in the supreme court unless such court or a judge thereof grants leave to file such an appeal," except "in cases involving questions under the constitution of the United States, or of this state * * *." See also Rules of Practice of the Supreme Court of Ohio, Rule II, Section 3(B).

A5), stating that "the threshold question * * * is not whether the state's limiting of the retroactive benefits of a new statutory interpretation through the use of a procedural rule is constitutional but whether that state procedural rule effectively precludes federal habeas corpus review of the underlying constitutional claim." Applying the *Wainwright* cause and prejudice standard, these four judges and one other (Pet. App. A11) concluded that Isaac had satisfied the "cause" requirement because (Pet. App. A5-A6): (1) before § 2901.05(A) was enacted, Ohio had allocated the burden of proving self-defense by a preponderance of the evidence to the defendant; (2) a dictum in an Ohio Supreme Court decision suggested that the statute had not changed the traditional rule; and (3) only after the *Robinson* decision "could Isaac [have] know[n] that the charge to the jury violated federal due process." According to these five judges (Pet. App. A6), "it would have seemed futile for Isaac to object to [the] jury instruction," and "[t]herefore, [he] had legitimate cause for his failure to object * * *." Judge Jones concurred only in the result (Pet. App. A12-A15). In his view Isaac had shown "cause" because (Pet. App. A14):

> Isaac neither knew nor could have known that the jury instructions at his trial were improper under *Robinson*, decided two years after his trial. There is no better "cause" for Isaac's failure to object to jury instructions than that the jury instructions were proper at the time of his trial.

As to prejudice, the four-judge plurality concluded that Isaac had also satisfied that requirement, since his trial testimony (Pet. App. A6 n.3) "made a substantial issue as to his self-defense contention * * *." Chief Judge Edwards agreed (Pet. App. A11); Judge Jones did not expressly address the question.

Judge Kennedy dissented (Pet. App. A21-A22) on the ground that Isaac had failed to show "cause" sufficient to excuse his procedural default; Judge Merritt agreed (Pet. App. A20).

On the merits, the four-judge plurality held that, as construed in *Robinson*, § 2901.05(A) required the prosecution to prove the absence of self-defense and, therefore, shifting the burden of persuasion on this issue to the defendant violated the Due Process Clause of the Fourteenth Amendment (Pet. App. A7-A10). Judge Edwards took the position that self-defense negatives the existence of the "criminal intent" necessary to constitute the offense of aggravated assault, and therefore due process prohibits the state from shifting the burden of persuasion on self-defense to the defendant.[6]

Judges Lively and Engel, dissenting, took the view that neither § 2901.05(A) nor the decision in *Robinson* made the absence of self-defense an element of the crime of aggravated assault; they accordingly concluded that there was no constitutional defect in respondent's trial (Pet. App. A16-A17; see *id.* at A23). Since the issue was purely one of state law, they saw no constitutional impediment to limiting the retroactive effect of *Robinson* (Pet. App. A18-A19).[7] Judge Jones, although agreeing that the issue in *Robinson* was purely one of state law, apparently concluded that the state courts were not constitutionally free to limit the retroactivity of *Robinson* (Pet. App. A13).

Bell* v. *Perini

On October 11, 1974, respondent Bell was indicted for aggravated murder (A. JA14). Following a jury trial on April 15, 1975, Bell was convicted of the lesser included offense of murder (A. JA15) and sentenced to serve 15 years to life imprisonment (Pet. App. A50).

The evidence at trial showed that on September 15, 1974, a local bartender telephoned Bell stating that five black men had just entered the Hub Cafe, where the bar-

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[6] Although Judge Merritt dissented on the "cause" issue, he noted his substantial agreement with this view of the merits (Pet. App. A20).

[7] Judge Kennedy noted her agreement with Judge Lively's view of the merits (Pet. App. A21).

tender worked, and that he feared trouble. Bell and James Clark went to the Hub Cafe, asked where the men were, and were told that they had left the premises.[8] Bell, armed with a .32 caliber revolver, left the Hub Cafe with the bartender and proceeded in the direction the five men had gone. At trial, Bell testified that as he and the bartender approached two of the men, the bartender shouted "He's got a gun," or "Watch out, he's got a gun." Bell then started shooting, and one of the two men fell to the ground. After the shooting Bell and Clark drove away in Clark's car. Later the two men abandoned Clark's car and reported it stolen (A. JA16-JA18).

On direct review the Ohio Court of Appeals affirmed the conviction (A. JA15-JA22). Bell raised no issues concerning the trial court's instruction to the jury that the defendant had the burden of proving self-defense by a preponderance of the evidence. The Ohio Supreme Court denied Bell's motion for leave to appeal (A. JA24).[9]

Bell then sought federal habeas corpus challenging for the first time the state trial court's jury instructions concerning the defendant's burden to prove self-defense by a preponderance of the evidence. The district court apparently found it unnecessary to consider whether Bell's claim was barred by the failure to make timely objection to the instruction (see Pet. App. A51 n.1), denying relief on the ground that *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), did not require the State to prove the absence of self-defense (Pet. App. A51-A55). On Bell's motion for reconsideration, the court also rejected the contention that the decision in *Robinson* was applicable even though Bell had failed to raise the issue on direct appeal (Pet. App. A56-A59).

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[8] Bell, who was also a bartender, had agreed with several other neighborhood bartenders that each of them would respond to calls for help from the others (A. JA17).

[9] But see Pet. App. A44, A45 (appeal dismissed for want of a substantial constitutional question).

On appeal, a divided panel of the Sixth Circuit reversed (Pet. App. A42-A47). The majority expressly adopted the reasoning of the plurality opinion in *Isaac* v. *Engle* on the cause and prejudice issues as well as on the merits (Pet. App. A46). One judge dissented on the ground that *Wainwright* v. *Sykes*, *supra*, barred review of Bell's claims on the merits (Pet. App. A47).

Hughes* v. *Engle

On December 16, 1974, respondent Hughes was indicted for aggravated murder (A. JA43). Following a jury trial, Hughes was convicted of the lesser included offense of voluntary manslaughter and sentenced to six to 25 years' imprisonment (Pet. App. A63).

The evidence at trial showed that, in the presence of seven witnesses, Hughes shot an unarmed man who had "extend[ed] his hand to shake with [Hughes] as a gesture of friendship * * * and no hard feelings" (A. JA28; see *id.* at JA25). Hughes had been drinking and was apparently angry about the victim's relationship with Hughes' former girlfriend (A. JA27-JA28).

On direct review, Hughes raised no claims respecting the trial court's self-defense instruction. The Ohio Court of Appeals affirmed the conviction (A. JA54-JA56). The Ohio Supreme Court denied Hughes' motion for leave to file an appeal (A. JA58) and dismissed his appeal as of right for want of a substantial constitutional question (A. JA59).[10] Hughes' petition for federal habeas corpus presented the following claim (A. JA26):

> The prosecution failed to prove that the accused was guilty as to each and every essential element of the offense charged and the trial court failed to so instruct the trial jury.

The district court interpreted this as a challenge to the state trial court's jury instruction requiring the defendant to prove self-defense by a preponderance of

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[10] The statement in the Magistrate's report and recommended decision (A. JA27) that "[b]oth the Court of Appeals * * * and the Ohio Supreme Court, rejected each of [Hughes'] claim[s] on the merits" apparently refers to the claims Hughes did raise, not the due process claim based on the erroneous instruction.

the evidence (Pet. App. A64; see also A. JA26). Relying on *Patterson* v. *New York*, 432 U.S. 197 (1977), it held that due process does not require the state to prove the absence of self-defense (Pet. App. A65-A66; see also A. JA32-JA35). In the alternative, the district court held that Hughes' failure to make timely objection to the challenged instruction barred review of the claim in federal collateral proceedings, stating (Pet. App. A67) that Hughes "has offered no explanation or justification for failing to object to the trial court's instruction at the time of trial. Nor has any actual prejudice * * * been shown."

On appeal, the Sixth Circuit reversed and remanded on the basis of the decision in *Isaac* (Pet. App. A60).[11]

SUMMARY OF ARGUMENT

1. The major premise of this Court's decision in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), is the "familiar" principle (*Yakus* v. *United States*, 321 U.S. 414, 444 (1944)) that rights may be lost, even in criminal cases, by failure to assert them in a timely fashion. Because the substantial policy interests furthered by contemporaneous objection rules were undermined by the deliberate bypass standard of *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court expressly rejected "deliberate bypass" as the standard for determining whether a failure to raise an objection as required by a contemporaneous objection rule bars consideration of the claim in federal habeas proceedings, requiring instead a showing of both "cause" sufficient to excuse the failure to preserve the claim during the original proceedings and "actual prejudice" from the error. *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 87-90.

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[11] Although Isaac appears to be the only respondent who raised any claim concerning the burden of proof on self-defense in any Ohio court, it has apparently been assumed that Ohio's post-conviction relief statute (Ohio Rev. Code Ann. § 2953.21 *et seq.* (Page 1975)) is unavailable (see Pet. App. A51 n.1; A. JA42). The Ohio Supreme Court has interpreted this statute to bar litigation of claims that were or could have been raised on direct appeal. See generally *Keener* v. *Ridenour*, 594 F.2d 581, 589-590 (6th Cir. 1979).

This Court left open for resolution in future cases the precise definition of "cause." The Sixth Circuit's decision in this case that the apparent or assumed futility of objection constitutes "cause" for excusing a procedural default virtually denies the term any content at all. To begin with, the decision apparently does not depend on counsel's actual reason for failing to preserve the claim, since the court granted relief here without any inquiry into that question. But if counsel did not withhold objection to the instructions in these cases because objection was deemed futile by him, there seems little reason for excusing the default on that basis.

Even if counsel for these three respondents considered making an objection and rejected that action as futile, the conclusion that a particular claim is unpromising is in the end not fundamentally different from any of the other reasons an attorney may decide against raising a claim. Although the cause and prejudice standard adopted in *Wainwright* was plainly thought to be significantly "narrower" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 87) than the deliberate bypass standard, the Sixth Circuit's construction of the cause requirement would in many cases render the cause and prejudice standard more liberal than the deliberate bypass standard. While an attorney's judgment that a particular claim is unpromising and therefore not worth making arguably constitutes a deliberate bypass, according to the Sixth Circuit that same decision is sufficient "cause" to excuse the procedural default.

In light of the forfeiture principle upon which the decision in *Wainwright* rests, and the reasons stated for adopting the cause and prejudice standard, the assumed futility of objection cannot constitute sufficient "cause" to excuse a procedural default. Procedural rules requiring that claims be raised at particular times or forgone do not depend on the existence of established case law supporting the claims. See, *e.g.*, Fed. R. Crim. P. 12, 30; see also *Sunal* v. *Large*, 332 U.S. 174, 180-183 (1947). If the claim is to be raised, it must be raised at the time specified. Even though a claim is not firmly established by existing case law, the possibility of a

modification in the governing legal principles is always possible. Moreover, the policies furthered by enforcement of contemporaneous objection rules (see 433 U.S. at 88-90) do not turn to any degree on the clarity of the law supporting the claim.

There is no injustice worked by this principle. If at the time of trial, a particular objection would have been futile, because contrary to settled law, subsequent developments in the law do not generally establish the "exceptional circumstances" necessary to justify disregarding otherwise dispositive procedural rules. *Lee* v. *Missouri*, 439 U.S. 461, 462 (1979). There is no constitutional requirement that final convictions be reevaluated in light of each new development in the law. See, *e.g.*, *Tehan* v. *Shott*, 382 U.S. 406 (1966). The goal is fairness, not perfection. *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973).

If, on the other hand, an attorney withholds contemporaneous objection on the basis of an *erroneous* assumption that such action would be futile, there is even less reason to ignore legitimate procedural rules on the basis of futility of objection. The purposes of contemporaneous objection rules would be wholly thwarted by allowing an excuse in such circumstances. Moreover, the risk that an attorney will make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system, and his decision not to investigate or pursue a particular claim must ordinarily be binding on his client. Otherwise, criminal litigation will be interminable.

2. Even if "futility" would in some cases be sufficient to excuse a procedural default, the judgment of the Sixth Circuit should be reversed. In these cases, the effect of the statute had not been determined and the language of the statute itself suggested that a change had been accomplished. There is no showing that objections made to the burden of proof instructions in Ohio trial courts were uniformly overruled, or, indeed, that the courts in respondents' own cases would not have given a "proper" instruction if requested to do so. Moreover, futility cannot be measured solely by the likely disposition of an objection at trial; counsel must be presumed to be aware

of the right of appellate review. The attorney for the defendant in *State* v. *Robinson*, 47 Ohio St.2d 103, 351 N.E.2d 88 (1976), obviously did not believe that objection was futile. He made a timely objection and conclusively demonstrated that his action was not futile.

ARGUMENT

I. INTRODUCTION

This case presents an assortment of complex and interrelated issues that produced six different opinions in the court of appeals. The divergence of opinion within the court was in part a product of different points of entry into the tangle of issues, as well as different conclusions about the threshold issues. Some judges approached the case by inquiring whether the "erroneous" jury instructions on the burden of proof raised issues of constitutional magnitude or simply of state law—a question whose answer depended upon the judges' understanding of the nature of the defense of self-defense under Ohio law and their interpretations of this Court's decisions in *Patterson* v. *New York*, 432 U.S. 197 (1977), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).

If any error at respondents' trials violated only state law, federal habeas corpus relief would presumably be unavailable—quite apart from any question of procedural default—unless the Ohio Supreme Court adopted a constitutionally impermissible retroactivity rule for its decision in *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976). Whatever the federal approach to the retroactivity of decisions on federal law, we doubt that the Constitution requires the states, when changing from one constitutionally permissible rule to another, to give the latter any particular kind or degree of retroactive application. See, *e.g.*, *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) (Cardozo, J.).[12]

[12] "This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

"We think the federal constitution has no voice upon the subject." *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, *supra*, 287 U.S. at 364.

Because the foregoing issues have relatively little impact on the administration of federal criminal justice, however, we do not undertake to address them in this brief. Rather, for purposes of this brief, we assume that the instructions on self-defense at respondents' trials raise a constitutional issue and thus present a fit subject for review in federal habeas proceedings, and we address the question whether respondents should be barred from presenting their claims because of their failure to preserve them by means of timely objection as required by a reasonable procedural rule. While this issue can manifest itself in various guises (see, *e.g.*, *Rose* v. *Lundy*, cert. granted, No. 80-846 (Feb. 23, 1981); *United States* v. *Frady*, 636 F.2d 506 (D.C. Cir. 1980), petition for cert. pending, No. 80-1595 (filed Mar. 20, 1981)), we here focus upon the correctness of the plurality's rationale that a procedural default should be excused by the apparent or assumed futility of objecting to the error at trial.

II. THE APPARENT FUTILITY OF OBJECTION IS NOT SUFFICIENT "CAUSE" TO EXCUSE A PROCEDURAL DEFAULT

A. The "Cause" Requirement Of *Wainwright* Is Not Satisfied Simply By A Finding That There Was Some Reasonable Explanation For The Failure To Object

1. If a criminal defendant's failure to make timely objection would bar his claim on direct appeal, the claim is also barred on collateral attack in federal court, absent a showing of both "cause" and "actual prejudice." *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).[13] Although the decision in *Wainwright* "leave[s] open for resolution in future decisions the precise definition of the 'cause'-and-

[13] *Wainwright* did not establish a contemporaneous-objection requirement independent of any contained in state law. See, *e.g.*, *Rummel* v. *Estelle*, 445 U.S. 263, 267 n.7 (1980); *County Court of Ulster* v. *Allen*, 442 U.S. 140, 152-153, 154 (1979); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976); *Newman* v. *Henderson*, 425 U.S. 967 (1976). On the other hand, although *Wainwright* was decided in the context of a formal rule expressly requiring con-

'prejudice' standard" (*id.* at 87), it is quite plain that the standard is substantially more difficult for a habeas petitioner to satisfy than the "deliberate bypass" standard of *Fay* v. *Noia*, 372 U.S. 391, 438-439 (1963). Under the deliberate bypass standard, if a criminal defendant could not be said to have waived his claim knowingly and intentionally, federal habeas corpus relief was generally available even though the claim would have been barred on direct appeal.[14] See, *e.g.*, *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972); *Fay* v. *Noia*, *supra*, 372 U.S. at 438-439.[15] Recognizing the substantial interests furthered by enforcement of contemporaneous-objection rules, this Court rejected the "deliberate bypass" standard for the purpose of determining whether the failure to comply with such a rule bars a claim on collateral attack in a federal court. *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 87-88 & n.12.[16]

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temporaneous objection, the reasons for adopting the "cause" and "prejudice" standard are fully applicable even where case law rather than a specific rule bars the claim if not timely raised. Cf. *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring).

[14] The deliberate bypass standard was also adopted to determine whether a criminal defendant's failure to raise a claim in accordance with state procedural rules would bar direct review in this Court. *Henry* v. *Mississippi*, 379 U.S. 443 (1965). The statement in the text, however, refers to direct review in state courts.

[15] "The classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 [(1938)]—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. * * * [W]e wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief." *Fay* v. *Noia*, *supra*, 372 U.S. at 439 (footnotes & citations omitted).

The emphasis in *Fay* v. *Noia* on the defendant's personal participation in the decision to forgo the claim was substantially eliminated in *Henry* v. *Mississippi*, *supra*, 379 U.S. at 451-452.

[16] In *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969), the deliberate bypass standard was held applicable in collateral attacks on federal convictions. The continuing vitality of *Kaufman* is questionable in light of subsequent cases, such as *Davis* v. *United States*, 411 U.S. 233 (1973), and recent federal cases have generally applied the cause and prejudice standard. See *United States* v.

Procedural rules requiring that particular types of claims be forfeited unless raised at or before trial generally do not depend on whether counsel actually considered the claim and then decided against raising it. See, *e.g.*, Fed. R. Crim. P. 12, 30. Rather, the claims must be raised at the specified time or forgone, whether the failure to comply with the rule was knowing and intentional or not. Superimposing the *Fay* v. *Noia* deliberate bypass standard on state and federal procedural rules, therefore, had the unwarranted effect of nullifying contemporaneous objection rules. While the rule might be enforced on direct appeal, federal habeas remained available. The ready availability of relief on collateral attack, however, discouraged enforcement of contemporaneous objection rules even on direct appeal. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 89-90. Thus, to the extent that enforcement of contemporaneous objection rules encouraged timely objection, the deliberate bypass standard substantially diluted that incentive.

The desirability of orderly trial administration and rules of procedure is obvious. See, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 184-185 nn.10, 11 (1979). In addition, this Court has identified at least four other substantial reasons for according contemporaneous objection rules "greater respect" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88) than the deliberate bypass standard does. First, timely objection may avert error, "thereby making a major contribution to finality in criminal litigation" (*ibid.*); even if the objection comes too late to avoid an initial error, corrective measures may be taken or, at the very least, the likelihood of repetition or similar errors is reduced.[17] Second, when an individual is brought

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Hearst, 638 F.2d 1190, 1196 (9th Cir. 1980), cert. denied, No. 80-1445 (Apr. 27, 1981); *United States* v. *Williams*, 615 F.2d 585, 591 (3d Cir. 1980); *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *Buckelew* v. *United States*, 575 F.2d 515, 519-520 (5th Cir. 1978); *Sincox* v. *United States*, 571 F.2d 876, 879-880 (5th Cir. 1978).

[17] As the Court noted in the context of a claim concerning the admission of evidence (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 89), "[a]n objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that

to court to stand trial, "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens" (*id.* at 90). "Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification" (*ibid.*). Third, "the rule of *Fay* v. *Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty * * * with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off" (433 U.S. at 89) and at a time when retrial is unlikely. Fourth, if factual findings are necessary, "[a] contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding" (*id.* at 88).

Thus, unlike the deliberate bypass standard of *Fay* v. *Noia*, the cause and prejudice standard does not require "'an intentional relinquishment or abandonment of a known right or privilege'" (*Fay* v. *Noia*, *supra*, 372 U.S. at 439, quoting *Johnson* v. *Zerbst*, 304 U.S. 458,

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the * * * trial judge will admit the evidence he must contemplate the possibility of reversal by the * * * appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the * * * rejection of the federal constitutional claim."

The same is true in other contexts. For example, in the instant cases an objection to the instruction on self-defense may well have forced the prosecution to consider the possibility that an appellate court might be persuaded to read § 2901.05(A) to mean what its language suggests, namely, that only the "burden of going forward with the evidence of an affirmative defense is upon the accused," but the burden of proof on the issue is on the prosecution. Depending on the strength of his case, the prosecutor might well have been willing to accept an instruction to the effect that the state had the burden of proving that the defendant did not act in self-defense. Also, even if the prosecutor refused to accede to such a request, the trial judge might have given the instruction despite the fact that it was not unambiguously required by existing decisions.

464 (1938)). *Wainwright* rests on the principle "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).[18] The inquiry mandated by the *Wainwright* "cause" requirement is not merely whether the attorney had a good reason for failing to make timely objection, but whether the reason is sufficient to outweigh the substantial interests furthered by generally enforcing contemporaneous objection rules.[19]

2. The plurality opinion for the court of appeals does recognize that a habeas petitioner who has failed to make a contemporaneous objection to an erroneous jury instruction, as required by a legitimate procedural rule, must satisfy the "cause and prejudice" standard of *Wainwright* in order to have his claim considered on the merits. It finds the "cause" element satisfied in these cases because, under Ohio law at the time, "it would have seemed futile" (Pet. App. A6) to make the objection. The opinion does not explain, however, why the apparent futility of objection ought to be held to satisfy the "cause" requirement, beyond saying that a defendant "cannot be expected to predict a change in the interpretation of state law" (*ibid.*).

Putting to one side for the moment whether it could reasonably have been assumed in these cases that objection would have been futile (see Part C,

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[18] See also *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring); *Davis* v. *United States*, 411 U.S. 233 (1973); *Tollett* v. *Henderson*, 411 U.S. 258, 267-268 (1973); *Michel* v. *Louisiana*, 350 U.S. 91, 99 (1955). See generally Spritzer, *Criminal Waiver, Procedural Default, and the Burger Court*, 126 U. Pa. L. Rev. 473 (1978).

[19] It should be emphasized that the inquiry is not whether the defendant's interest in having his claim reviewed on the merits outweighs the state's interest in enforcing its procedural rule in his particular case. Rather, the question is whether the reason offered in a particular case is sufficiently compelling to justify disregarding the state's interest in generally enforcing its procedural rules.

infra), it should be noted that the court's holding, perhaps unwittingly, adopts the central component of the "deliberate bypass" standard in determining the existence of "cause." The principal significance of the "fact" that the decision in *Robinson* could not have been predicted, after all, is that the failure to object did not constitute a relinquishment of a known right. If that suffices to excuse a procedural default, then the "cause and prejudice" standard is no more protective of reasonable procedural rules than the standard it supplanted.[20]

In addition, the court of appeals' finding of "cause" based on the supposed futility of objection does not appear to depend at all on the actual reason counsel failed to object to the offending instruction. The court of appeals made no inquiry into the actual reasons for the defaults, and the record in the three cases is, so far as we are aware, silent on the subject. Of course, if the failure to object was not in fact the product of any assumption by counsel, reasonable or otherwise, about the futility of objection, it is difficult to understand why the possibility that some other attorney might have elected to ignore the contemporaneous objection requirement on futility grounds is sufficient to excuse the defaults in these cases.

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[20] The Sixth Circuit's reliance (Pet. App. A6) on *O'Connor* v. *Ohio*, 385 U.S. 92 (1966) (*O'Connor II*), suggests that the court's incorporation of the known-right component of the deliberate bypass standard was intentional. In *O'Connor* v. *Ohio*, 382 U.S. 286 (1965) (*O'Connor I*), this Court vacated the judgment of the Ohio Supreme Court and remanded the case for reconsideration in light of *Griffin* v. *California*, 380 U.S. 609 (1965). On remand, the state court held that the defendant's Fifth Amendment claim was barred by his failure to make timely objection to the prosecutor's comments on his failure to testify. This Court reversed (*O'Connor II*) stating (385 U.S. at 93), "Defendants can no more be charged with anticipating the *Griffin* decision than can the States." When *O'Connor II* was decided, the deliberate bypass standard had been held applicable on direct review in this Court. *Henry* v. *Mississippi*, *supra*. Thus, in *O'Connor II* this Court simply held that a defendant could not "knowingly and intentionally" waive a right that neither he nor his counsel could have known existed.

If, on the other hand, counsel considered the possibility of objecting to the instruction but rejected (deliberately bypassed?) that option because it appeared futile in light of the applicable law at the time, that too should not excuse the default. This is so even if the Sixth Circuit is right that an attorney's judgment that a particular claim is insubstantial or unlikely to be accepted constitutes a "reasonable" ground for failing to raise the claim. The court offered no basis, and we perceive none, for distinguishing the assumed futility of objection from all the other strategic or tactical considerations that must be taken into account in deciding which claims should be pursued and which forgone. Not every conceivable argument can be effectively presented in any litigation. Of necessity, an attorney must focus his attention on those claims that he believes are most likely to prove helpful. Existing case law tending to support or undercut a particular claim is only one of the many factors that must be considered. The Sixth Circuit majority effectively adopts the untenable position that because the assumed futility of objection *explains* the failure to make timely objection, it also excuses it.

We submit that the concept of "cause" cannot mean simply that defense counsel may have had some good explanation for failing to make timely objection. See *Satterfield* v. *Zahradnick*, 572 F.2d 443, 446 (4th Cir.), cert. denied, 436 U.S. 920 (1978). With respect to those claims that the attorney considered and nevertheless failed to raise, there will always be some reason, and in most cases a good reason, for his decision. He may conclude that a claim is insubstantial in light of current law and that the likelihood of prompting a change in the law is small. Or, given his theory of the case or the strength of the prosecution's case, a lawyer might conclude that a particular claim is relatively unimportant in terms of its likely impact upon the outcome of the trial (see, *e.g.*, *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93 n.2 (Burger, C.J., concurring); *United States* v. *Frady*, *supra*). If a lawyer has several points to make at trial (or on appeal), any one of which might be dispositive, he may

reasonably conclude that others are not worth pursuing or, indeed, harmful, on the theory that raising an unpromising argument might divert attention from or dilute the force of other arguments that are judged more likely to succeed. See *Cole* v. *Stevenson*, 620 F.2d 1055, 1071 n.25 (4th Cir. 1980) (en banc) (Murnaghan, J., dissenting).

An advocate's goal is to win the war or, failing that, minimize the consequences of the loss, not simply to win as many little skirmishes as he can. Cf. *Tollett* v. *Henderson*, *supra*, 411 U.S. at 267-268; *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 768-771 (1970). The possible reasons for failing to raise a potentially meritorious claim are limitless. A decision to refrain from objection for reasons such as are suggested in the preceding paragraph would be an intentional and knowing one and arguably would even constitute a "deliberate bypass" of orderly trial procedures for raising the claim. See, *e.g.*, *Murch* v. *Mottram*, 409 U.S. 41 (1972); *Coco* v. *United States*, 569 F.2d 367 (5th Cir. 1978); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972); cf. *Lefkowitz* v. *Newsome*, 420 U.S. 283, 291 (1975). Ironically, however, if the "cause" requirement of *Wainwright* is satisfied by the existence of a reasonable explanation for failure to raise a claim in timely fashion, it would be satisfied in each of these cases, thus making the "cause and prejudice" standard more lenient than the "deliberate bypass" standard.

B. Absent Exceptional Circumstances, An Attorney's Failure To Raise A Claim Is Binding on His Client

1. In an adversary system, "the decision to assert or not to assert constitutional rights or constitutionally based objections at trial is necessarily entrusted to the defendant's attorney, who must make on-the-spot decisions at virtually all stages of a criminal trial." *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93 (Burger, C.J., concurring). If criminal litigation is ever to come to an end, those decisions must be binding, absent "exceptional

circumstances" or the substantial possibility "of a miscarriage of justice." See *id.* at 91 & n.14; see also *id.* at 95 n.2 (Stevens, J., concurring).[21]

If the defendant has been denied a fair opportunity to raise his claim in accordance with the governing procedural rule—for example, if the trial court refuses to entertain objections to jury instructions—that would constitute sufficient "cause" to excuse an alleged procedural default.[22] Under such circumstances, the possibility of injustice is manifest and the state's interest in generally enforcing its procedural rules, however substantial, is outweighed by the defendant's right to a fair opportunity to raise his claims. Compare *Reece* v. *Georgia*, 350 U.S. 85 (1955), with *Michel* v. *Louisiana*, 350 U.S. 91 (1955). There are no doubt other "exceptional" circumstances in which the "cause" requirement would be satisfied, but it is unnecessary to speculate as to what they might be. For present purposes, it suffices to note that the focus of the inquiry must be whether the proffered explanation for the failure to make timely objection is so compelling as to justify disregard of the substantial interests furthered by enforcement of contemporaneous objection rules.

2. The apparent futility of objection should be held insufficient to constitute "cause." *E.g.*, *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *Ratcliff* v. *Estelle*, 597 F.2d 474, 476-477 (5th Cir. 1979); *United States ex rel.*

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[21] See also *Estelle* v. *Williams*, *supra*, 425 U.S. at 508 n.3; *id.* at 513-515 (Powell, J., concurring); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671, 679 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972); see generally *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 149-150 (1970).

[22] See *White* v. *Estelle*, 566 F.2d 500 (5th Cir. 1978); cf. *Rose* v. *Mitchell*, 443 U.S. 545, 561, 563 (1979); *Stone* v. *Powell*, 428 U.S. 465 (1976); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Sunal* v. *Large*, 332 U.S. 174, 182-183 (1947); *Boyd* v. *Mintz*, 631 F.2d 247 (3d Cir. 1980); see generally *Dumont* v. *Estelle*, 513 F.2d 793, 797 (5th Cir. 1975); see also *Pedrero* v. *Wainwright*, 590 F.2d 1383 (5th Cir. 1979); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050 (1978).

Maxey v. *Morris*, 591 F.2d 386, 391 (7th Cir.), cert. denied, 442 U.S. 912 (1979). As suggested above, an attorney's judgment that a particular claim is unpromising or not worth pursuing for other reasons is essentially a strategic or tactical decision and not fundamentally different from any other such decision. If, as in these cases, such a judgment is mistaken (see Part C, *infra*), there is certainly no justification for refusing to permit the state to enforce its procedural default rule, at least short of a finding of constitutionally ineffective assistance of counsel.[23] The possibility that an attorney will make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system and ordinarily even his "erroneous" decisions must be binding. "[T]he orderly administration of justice requires that even a criminal case some day come to an end." *Larson* v. *United States*, 275 F.2d 673, 680 (5th Cir. 1960).

Even if it would, in fact, have been futile to raise the claim at trial, however, a subsequent judicial decision ordinarily provides no reason for disregarding otherwise

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[23] Compare *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980), and *Polizzi* v. *United States*, 550 F.2d 1133, 1138-1139 (9th Cir. 1976), with *United States* v. *Williams*, 615 F.2d 585, 591 (3d Cir. 1980), and *Boyer* v. *Patton*, 579 F.2d 284 (3d Cir. 1978), and *Sincox* v. *United States*, 571 F.2d 876 (5th Cir. 1978). See generally *Graham* v. *Mabry*, No. 80-1875 (8th Cir. Apr. 3, 1981), slip op. 9; *United States* v. *Hearst*, 638 F.2d 1190 (9th Cir. 1980), cert. denied, No. 80-1445 (Apr. 27, 1981); *Jiminez* v. *Estelle*, 557 F.2d 506 (5th Cir. 1977). See also *Gates* v. *Henderson*, 568 F.2d 830, 843 n.6 (2d Cir. 1977) (en banc) (Oakes, J., concurring), cert. denied, 434 U.S. 1038 (1978). Some courts have suggested, however, that mere inadvertence or ignorance is sufficient cause. See *Rachel* v. *Bordenkircher*, 590 F.2d 200 (6th Cir. 1978) (inexperience, inattention, or lack of knowledge of the law sufficient cause); *Collins* v. *Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), cert. denied, 439 U.S. 1133 (1979) (lack of knowledge of law or facts sufficient cause); see also *Jurek* v. *Estelle*, 593 F.2d 672, 683, 684 n.25 (5th Cir.) (in capital case, serious misfeasance is sufficient cause), vacated, 597 F.2d 590 (1979) (see 5th Cir. R. 17), decision on rehearing en banc, 623 F.2d 929 (5th Cir. 1980), cert. denied, No. 80-763 (Mar. 23, 1981).

legitimate procedural rules. See *Cole* v. *Stevenson*, *supra*, 620 F.2d at 1062-1063; *Indiviglio* v. *United States*, *supra*, 612 F.2d at 631; *Dumont* v. *Estelle*, 513 F.2d 793, 798-799 (5th Cir. 1975); see also *Ratcliff* v. *Estelle*, *supra*, 597 F.2d at 476-477; *United States ex rel. Maxey* v. *Morris*, *supra*, 591 F.2d at 391.[24] Having failed to pursue the avenues for relief provided, respondents should not be permitted in federal collateral proceedings "to justify their failure by saying they deemed any [objection] futile." *Sunal* v. *Large*, *supra*, 332 U.S. at 181.

The Sixth Circuit's holding that the assumed futility of objection is sufficient "cause" to excuse a procedural default may rest on the notion that a criminal defendant has some right to have the "important" legal issues in his case determined in light of the most recent decisions on the point (see Pet. App. A6; *id.* at A14 (Jones, J., concurring)). See also *United States* v. *Frady*, *supra*. That is, if the later decision had been the law at the time of trial, counsel would have raised the issue and it would have been decided in favor of the defendant. Since the defendant could not have known of the subsequent decision at the time of trial, he cannot be held responsible for the failure to raise the claim. Therefore, it is somehow unfair to "punish" him for failure to raise the claim, by enforcing a contemporaneous objection rule. This approach is faulty for two reasons. First, a criminal defendant has no right to have the legal issues in his case determined in light of subsequent decisions.[25] Second, it misconceives the nature of contem-

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[24] Contra, *United States* v. *Frady*, 636 F.2d 506, 513 n.17 (D.C. Cir. 1980); compare *Rummel* v. *Estelle*, 587 F.2d 651, 653 & n.2 (5th Cir. 1978) (en banc), aff'd on other grounds, 445 U.S. 263, 267 n.7 (1980).

[25] As Judge Friendly pointed out in a similar context:

> There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" [*Sunal*

poraneous objection rules, which do not turn on the extent of the litigant's knowledge or blameworthiness.

This Court has frequently refused to give retroactive application to decisions announcing new legal rules in criminal cases. See, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531 (1975); *Daniel* v. *Louisiana*, 420 U.S. 31 (1975); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). A criminal defendant therefore plainly has no general right to have legal issues involved in his case determined or redetermined in light of the most recent decisions of this Court or other governing authority. Nor does a criminal defendant have any substantial basis for complaint if his attorney, though competent, fails to anticipate a particular holding on a point that could have been, but was not, raised at his trial. "'[A] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (citations omitted).

The proposition that apparent futility of objection should excuse a procedural default has thus far not found favor with this Court. For example, in *Lee* v. *Missouri*, 439 U.S. 461 (1979), this Court held *Duren* v. *Missouri*, 439 U.S. 357 (1979), applicable to any case in which the jury was empaneled after the decision in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).[26] But the Court specifically noted that

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> v. *Large*,] 332 U.S. at 182 * * *, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. * * * When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws.

United States v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963).

[26] *Taylor* is inapplicable to cases in which the jury was sworn prior to the date of that decision. *Daniel* v. *Louisiana*, 420 U.S. 31 (1975).

> in any case in which a jury was sworn subsequent to *Taylor* v. *Louisiana* and the fair-cross-section claim based on exclusion of women was rejected on direct review or in state collateral proceedings because of the defendant's failure to assert the claim in timely fashion, relief is unavailable under 28 U.S.C. § 2254 unless the petitioner can show cause for having failed to raise his claim properly in the state courts. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Lee v. *Missouri*, *supra*, 439 U.S. at 462. See also *Hankerson* v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977). The subsequent decision in *Duren*, though retroactive, was not thought to constitute sufficient "cause" to excuse the failure to raise a timely objection.

It is of course true that in cases considering the retroactivity of new decisions this Court has treated the fact that the new rule relates to the reliability of the guilt-determining process as a consideration weighing strongly in favor of retroactivity. See *Hankerson* v. *North Carolina*, *supra*, 432 U.S. at 233. The court of appeals appears to have been influenced by this kind of consideration in concluding that respondents' procedural defaults should be excused. But even assuming that the Ohio Supreme Court's decision in *Robinson* was the kind that would be given full retroactive effect by this Court,[27] that does not suffice to resolve the question whether the failure to comply with legitimate procedural rules should bar the claim on collateral attack. Indeed, this Court's retroactivity decisions do not purport to decide whether a claim should be available despite a procedural default. As the Court observed in the process of holding *Mullaney* v. *Wilbur*, *supra*, retroactive in *Hankerson*, addressing

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[27] We note that *Robinson* was not a constitutional decision (47 Ohio St.2d at 113-114 n.11, 351 N.E.2d at 95-96 n.11); nor was its major purpose to remedy a defect in Ohio trial procedure that substantially impaired the truth-finding function or raised serious questions about the accuracy of verdicts in past trials. Rather, it was simply an attempt to construe a statute that the court believed had effected a change in the earlier state procedure.

the contention that retroactivity would impose substantial burdens on the administration of justice (432 U.S. at 244 n.8):

> The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

This, of course, is precisely what the Supreme Court of Ohio did in holding *Robinson* retroactive but insisting upon enforcing its contemporaneous objection rule in cases like those of respondents. Without repeating the arguments we have made above regarding the values served by contemporaneous objection rules and the difficulties in assessing, in the absence of timely objection, the importance of the issue and of differentiating between the assumed futility of objection and other tactical decisions made by counsel in the course of trial, we submit that a change of law, even an unforeseeable one, does not require Ohio to forgo enforcement of its legitimate procedural rules.

3. Substantial policy considerations counsel against accepting the notion that apparent futility, or futility in fact, is sufficient "cause" to excuse a procedural default. First, and perhaps most important, a refusal to enforce procedural defaults for this reason could have extraordinarily sweeping consequences when a new rule is announced relating to a frequently used instruction or recurring evidentiary point. Large numbers of prior cases, tried without objection under the prior practice, would become subject to invalidation in collateral attack proceedings.[28]

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[28] Since *Robinson* construed a statute that had been in effect for only two years, the number of Ohio convictions subject to reversal because of erroneous instruction on the burden of proving self-defense may be relatively small. Nevertheless, acceptance of the assumed futility of objection as sufficient "cause" to excuse a procedural default could have a far greater impact in other situations. For example, in *United States* v. *Frady*, *supra*, the D.C. Circuit held that the assumed futility of objection to certain jury instructions concerning malice that were "standard" (636 F.2d at 513

In addition, unless a retrospective judicial conclusion of futility is to be deemed sufficient without regard to the actual reasons for the default in the particular case, the federal courts will inevitably be drawn into the "complex task of disentangling excusable lack of clairvoyance from quiet strategic waiver. The answer in each case, turning on subtle degrees, would necessarily be haphazard, and its basis * * * inherently unsatisfactory" (*Dumont* v. *Estelle*, *supra*, 513 F.2d at 798). Moreover, except in a few clear cases involving overruling of settled precedent, the judgment that objection could reasonably have been deemed futile will involve a substantial element of speculation and second-guessing that would be wholly unnecessary if the procedural rule had been complied with.

Moreover, like the deliberate bypass rule, acceptance of such an excuse for a procedural default removes incentives to raise claims that may prompt improvements in the law. Compare *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). That is, there is little reason to spend time and effort pursuing a claim that is, by definition, unlikely to be successful if nothing is lost by failing to do so.

Finally, accepting "futility" as sufficient "cause" would encourage the sort of "sandbagging" criticized in *Wainwright*. An objection or argument that, if made at trial, provides only marginal prospects of affecting the result even if successful, can increase in value after conviction. If it is entertained and accepted on direct appeal the defendant will probably get a "second bite" at the apple. See, *e.g.*, *United States* v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963). A second chance for acquittal relatively soon after the first trial is valuable, but later events may make retrial substantially more difficult, if not impossible. After all other claims have been rejected, a claim that might have been relatively insignificant at

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n.17) at the time of trial was sufficient to excuse the procedural default imposed by Fed. R. Crim. P. 30. The decision in *Frady* casts doubt on the validity of every murder conviction in the District of Columbia prior to the time the standard instruction was held to be improper.

trial may as a practical matter become dispositive if accepted on collateral attack.

C. The Court of Appeals Erred In Concluding That Objection To The Self-Defense Instruction Would Have Been Futile In These Cases

Even if this Court were to agree with the general proposition that a defendant may be excused from a default due to noncompliance with a contemporaneous objection requirement when it is clear that objection would have been futile, the court of appeals' application of that principle to the present cases cannot be justified. There is simply no basis for the conclusion that objection to the instructions placing the burden of proof of self-defense on these respondents would have been futile.

At the outset, it must be noted that futility cannot be assessed solely on the basis of the likely ruling of the trial court on the motion or objection. A defendant's counsel obviously is aware, at the time he is deciding whether to preserve his claim, that any conviction is subject to appellate review, and, if the claim is based on the federal Constitution, that there exists the possibility of direct review by this Court or collateral review pursuant to 28 U.S.C. 2254 in the federal district court. Unless it may reasonably be concluded that the claim is bound to be rejected by any reviewing courts to which it may be presented, there cannot be the kind of manifest futility that could even arguably suffice to overcome the interests of the state in enforcement of orderly rules of procedure.

In the present cases, it seems plain that timely objection could not reasonably have been determined to be futile. The language of § 2901.05(A) is readily susceptible to the construction adopted soon after respondents' trials by the Supreme Court of Ohio in *State* v. *Robinson*, *supra*, placing only the burden of going forward with the evidence of self-defense on the accused. There has in fact been no showing that other similarly situated defendants who requested instructions to that effect were consistently or even usually refused their requests by

the trial courts in Ohio. It is thus entirely possible that timely and adequately explained requests for favorable instructions in respondents' own trials would have been accepted by the trial courts. See *State* v. *Robinson*, 48 Ohio App.2d 197, 200-201, 356 N.E.2d 725, 727-728 (1975).

In any event, even if contemporaneous objection would have been unavailing in the trial courts, preservation of the objection would not have been futile, as the defendant in *Robinson* proved. Nothing in *Robinson* suggests that such an objection would have been rejected even on January 1, 1974, the effective date of § 2901.05 (A). The court relied primarily on the legislative history of the statute and its language. *State* v. *Robinson*, *supra*, 47 Ohio St.2d at 110-113, 351 N.E.2d at 93-95; see also *State* v. *Robinson*, *supra*, 48 Ohio App.2d at 200-201, 356 N.E.2d at 727-728.

The dictum in *State* v. *Rogers*, 43 Ohio St.2d 28, 330 N.E.2d 674 (1975), on which the plurality opinion relied to support the conclusion that "it would have seemed futile for Isaac to object" (Pet. App. A6), is an insubstantial basis for a finding of futility.[29] Compare *United States* v. *Sobell*, *supra*, 314 F.2d at 330-331. Indeed, the majority in *Robinson* apparently felt no need to address *Rogers*, although it was cited in the dissent (see 47 Ohio St.2d at 117-118, 351 N.E.2d at 97-98).[30] Dictum that is arguably inconsistent with the plain language of a statute can hardly be regarded as dispositive. Since it was clear that the court had not considered the effect of the statute in *Rogers*, it is difficult to see how respondents or their attorneys could have reasonably believed that the issue was foreclosed by existing case law. In sum, unless any objection for which there is no decision precisely on point is futile, it cannot

[29] The law in Ohio prior to the enactment of § 2901.05(A) is beside the point. The question is whether the statutory provision effected a change in the law. That question was not addressed in *Rogers*.

[30] Nor did the state court of appeals in *Robinson* find it necessary to discuss the dictum in *Rogers*. See 48 Ohio App.2d at 200-201, 356 N.E.2d at 727-728.

reasonably be concluded that objection in these cases was.[31]

CONCLUSION

The judgments of the United States Court of Appeals for the Sixth Circuit should be reversed or vacated and remanded.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
GEORGE W. JONES
Assistant to the Solicitor General

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[31] Although we are uncertain whether the second question presented in the petition for a writ of certiorari (Pet. i) embraces the issue, we note our concern with the manner in which the court of appeals disposed of the "prejudice" component of the "cause and prejudice" standard. Without evaluation or even mention of the evidence at trial, the court of appeals concluded that actual prejudice had been shown simply because each of the respondents had raised the issue of self-defense at trial (see Pet. App. A6 & n.3; *id.* at A46; *id.* at A60). It may be, however, that, as in *Wainwright* (433 U.S. at 91), "the * * * evidence of guilt [and of the absence of self-defense] at trial * * * was substantial to a degree that would negate any possibility of actual prejudice" resulting from the erroneous jury instructions in each of these cases. For example, it seems quite doubtful that respondent Hughes suffered any actual prejudice. The evidence at trial showed that immediately after the victim had extended his hand "to shake with [Hughes] as a gesture of friendship * * * and no hard feelings," Hughes shot the unarmed man twice in the presence of seven witnesses (A. JA28; see *id.* at JA27, JA55-JA56). The only evidence to support the self-defense theory was Hughes' own somewhat vague testimony (A. JA28-JA29).

In our view, therefore, once the court of appeals concluded that "cause" sufficient to excuse the failure to object at trial had been shown, it should have remanded to the district courts for an assessment of actual prejudice in light of the trial record.

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